# 11-3440

## United States Court of Appeals for the Third Circuit

NATIONAL LABOR RELATIONS BOARD,
*Petitioner,*

1199 SEIU UNITED HEALTHCARE WORKERS EAST, N.J. REGION,
*Intervenor,*

v.

NEW VISTA NURSING AND REHABILITATION,
*Respondent.*

ON REVIEW FROM THE NATIONAL LABOR RELATIONS BOARD

# REPLY BRIEF FOR NEW VISTA NURSING AND REHABILITATION

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## INTRODUCTION

This memorandum is filed by New Vista Nursing and rehabilitation, LLC ("New Vista") in reply to that filed by the National Labor Relations Board ("NLRB", "Board", "GC") regarding the issues raised by the Court's remand in this case. The Court has limited this reply, in its order, to five pages.

## THE BOARD MAY NOT 'CONSULT' WITH ITS GENERAL COUNSEL ON CASES PENDING BEFORE IT

The Board's General Counsel ("GC") argues in its remand answering brief that as counsel to the Board before this Court, it may have *ex parte* strategic discussions with its "client". However, New Vista must point out that what was being contemplated here was a remand to the Board for "full consideration" (as the GC calls it in the answering brief (at "Introduction")) of motions for reconsideration *before the Board*. Those motions were regarding a Board case where the GC was an advocate/litigant in the case, not counsel to the Board. The Board was acting as the "judge" in the motions for reconsideration in the case. As a *litigant* in the case, the GC, at the very least, was told that the decision in the case would result *in its return* to an enforcing court within 30 days. There was no chance, the GC knew, that the Board might actually grant the motions for reconsideration and thereby find that enforcement in court would no longer be

necessary or appropriate.

Rather the GC "knew" that it would "win" the motions for reconsideration and would do so within 30 days. It also knew that the enforcement proceeding would continue thereafter as it further blended its "prosecutorial" and "counsel" functions with the Board.

Unlike this Court and New Vista, the GC *knew* that the "full consideration" of the multiple motions for reconsideration before the Board, would take less than 30 days to resolve and that the resolution would be *in its favor*. It knew this because the Board, *ex parte*, told the GC this. Of course, we do not know what else the GC was told. These motions were assertedly being "...considered anew..." as the GC in its answering brief on remand asserts. Yet, while those motions, respectively, were considered *for months* by the original panels that considered them, all three were decided in ten days by this new panel. The GC, as a litigant, had no risk of loss if the case was remanded. It knew that it would win its case before the Board, within 30 days. This is not "due process" and the proceedings were not "fair and regular".

## THE COMPARISON OF MEMBER HIROZAWA TO MEMBER BECKER IS INAPT

The GC's answering brief states only that Member Hirozawa ("Hirozawa")

did not participate in the handling of *this* case. It does not deny, though, that Hirozawa actively represented the charging party union , and this local, while at the law firm that is representing the same client, and this local, *in this case.*

Hirozawa's term at the Board expires in August 2016, a little over four months from now. Hirozawa has not stated that he is not returning to his old law firm when his term ends. Indeed, he could be back at his old, nine member, firm while this case is still *sub judice* before this court .

The GC's answering brief slavishly cites to hyper technical compliance with various rules and executive orders to justify Hirozawa's participation in this case. It also engages in impermissible *post hoc* rationalizations in asserting that Hirozawa "held" that he was not compromised enough to even have to "run it up the flagpole", as the rules appear to require. (See GC brief at "9")

It is respectfully submitted, however, that the applicable test is how an objective "reasonable" person with knowledge of the facts would view the appearance of impropriety or bias in Hirozawa's participation in a case that *his* law firm is representing one of the parties in *this* very case before *him* at the NLRB.

Moreover, it is likely that the rules and executive orders cited did not contemplate that, as the "Rip Van Winkle" of administrative agencies, a case could be "out there" for five or six years. Thus, a case that was started when

Hirozawa was still at the firm, could still be pending before the NLRB five years later. ("Today's decision confirms the NLRB has become the Rip Van Winkle of administrative agencies" *Register-Guard* 351 NLRB at 1121 quoting *NLRB v Thill* 980 F2d 1137-1142 (7th Cir., 1992)

The analogy to Member Becker ("Becker") referred to by the GC brief at 10 is particularly inapt. In that case, Becker asserted that he represented the "International" SEIU at its Washington DC office and his *office* played no role in the litigation of the case before the Board, at all. In this case, not only did Hirozawa's office represent the Local (which was sufficient for Chairman Pearce to recuse himself, since he represented the same local as a client at his office in upstate New York), his office represented *this* New Jersey local *in this very case from its inception to this date.* He does not assert that, as Becker did, he had no knowledge of the case, only that he did not participate in its litigation. This Court pointed this out as well:

> The Board also noted that Member Becker "played no role in and has no knowledge of" the 2003 proceeding, and that, although he did serve as counsel to the SEIU in the past, he never served as its "general counsel." (A-1.)
> **(*NLRB v Regency Grande Nursing & Rehab. Ctr.*, 453 F App'x 193, 197 [3d Cir 2011].)**

Any objective person with knowledge of these facts would have doubts about Hirozawa's impartiality in the case. He should have recused himself and let another Board member hear the matter. His participation tainted the entire panel and the disposition should be set aside by the Court.

## CONCLUSION

Based on the forgoing, the Board's disposition, particularly of the motion for reconsideration as it relates to 1) whether there was a quorum that properly decided the August motion for reconsideration and 2) whether the Board adequately explained its departure from its own precedent in denying a fact hearing in granting summary judgment should be accorded no deference as it resulted from a denial of due process and its proceedings were not fair and regular or, in the alternative, the matter should be remanded to an impartial panel to determine the multiple motions for reconsideration.

RESPECTFULLY SUBMITTED

Dated: April 5, 2016

s/ Morris Tuchman
Morris Tuchman, Esq.

## CERTIFICATE OF BAR MEMBERSHIP

I hereby certify to be counsel for Respondent, New Vista Nursing and Rehabilitation, I am a member in good standing of the Bar of the United States Court of Appeals for the Third Circuit.

Dated: April 5, 2016

s/ Morris Tuchman
Morris Tuchman, Esq.

## CERTIFICATE OF WORD COUNT

Pursuant to Fed. R. App. P. 32(a)(7)(C), I hereby certify that the foregoing Reply brief contains __1, 074__ words, excluding the parts of the brief exempted by Fed. R. App. R. 32(a)(7)(B)(iii).

Dated: April 5, 2016

s/ Morris Tuchman
Morris Tuchman, Esq.

## CERTIFICATE OF IDENTICAL BRIEFS, AND VIRUS SCAN

I hereby certify that the text of Respondent's Reply E-Brief PDF form and the paper copies are identical. I further certify that the Reply E-Brief was scanned for viruses using ESET NOD32 Antivirus 4, and that no viruses were detected.

Dated: April 5, 2016

s/ Morris Tuchman
Morris Tuchman, Esq.

## CERTIFICATION OF SERVICE

I, Morris Tuchman, hereby certify that on this date, I caused an Adobe PDF file containing the foregoing Reply Brief on behalf of Respondent to be filed with the Clerk of the Court using CM/ECF and, as such, the Reply Brief was served electronically upon all counsel of record.

I further certify that on this date, I caused the hard copies of the Respondent's Reply Brief to be properly served on the Court by UPS service for next-day delivery.

Dated: April 5, 2016

s/ Morris Tuchman
Morris Tuchman, Esq.